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for the
COMMUNICATIONS SUBCOMMITTEE OF THE SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
HEARING ON EFFORTS TO REDUCE SPAM
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Chairman Burns, Senator Hollings and distinguished Senators, it is an honor to appear before you here today.

My name is Harris Pogust, and I am an attorney from Pennsauken, New Jersey. I work at a small firm which represents over 2,000 small businesses in the Philadelphia and Southern New Jersey areas. Over the last several years my practice has focused on technology-related issues. It is only because of the disturbing rise in spamming, which has begun to cost my clients valuable time and expense, that I have become involved with this issue.

I am here today, Senators, representing those small businessmen and women who have suffered commercial loss and other economic damages as a result of the conduct of entities that transmit thousands upon thousands of junk e-mails on a daily basis. This junk mail clogs the Internet and takes up valuable space on my clients' computer systems, takes up valuable employee time, and costs my clients hundreds, and in some instances thousands, of dollars a year in unnecessary and unwanted expenses. As the Internet has grown, the problem of unsolicited emails has increased to the point of where it has become an intolerable burden on my clients as well as myself. I commend you for identifying this issue as an important concern for this Subcommittee's oversight agenda.

This is not the first time Congress has had to address the problems associated with the introduction of new technologies in the workplace. Ten years ago, when fax machines first became increasingly prevalent in offices across the country, and on Capitol Hill, Congress enacted the Telephone Consumer Protection Act (“TCPA”) (47 USC §227) in response to the overwhelming volume of unsolicited faxes being sent. At that time, Congress decided to draw the line and let the senders of these unwanted faxes (in the form of solicitations and other questionable promotions) know that they could not continue their intrusive practices, which were clogging fax lines and wasting costly paper and employee time at small and large businesses alike.

The TCPA prohibits any person from using any telephone fax machine, computer or other device to send an unsolicited advertisement to a telephone fax machine. Among other provisions, the law provides a private right of action and there is broad consensus that the TCPA has certainly curtailed the volume of junk faxes received in this country. In spite of some predictions to the contrary, when this piece of legislation became law, it did not result in a proliferation of litigation. What did occur was that millions of unwanted junk faxes were no longer being sent as the deterrence effect of a private right of action took hold. The concerns addressed in the TCPA are the identical concerns that this legislation is seeking to address. The TCPA has saved businesses millions of dollars in unwanted overhead expenses and has been a valuable tool in fighting unwanted faxes by allowing a private right of action for damages and injunctive relief. The threat of possible litigation in and of itself has clearly been a deterrent to those who may have thought about violating the junk fax law.

The TCPA allows any person to bring suit in state court to enjoin a violation of the Act and to recover their actual monetary losses from such violations or they may seek a \$500.00 penalty for each violation, whichever is greater. Additionally, the courts are authorized to award treble damages for egregious conduct—that is, where there are willful or knowing violations. Unfortunately, the pending legislation provides no such remedy to small businesses and individuals that suffer actual commercial consequences from junk e-mails filling their online mailboxes.

While I applaud this Subcommittee's efforts to attempt to curb this latest abuse of technology - spam-- there is one aspect of this bill that I, along with others, would like to see changed. I am concerned that this bill does not provide a private right of action for the many small businesses and individuals who have faced lost time or money due to these unsolicited emails filling their inboxes. While I believe Congress must approach this issue in a balanced fashion—and I support the comprehensive enforcement measures already proposed in S.630—I also believe that there will be some cases in which an individual or business must directly seek recovery to address the economic harm they have suffered.

The largest Internet service provider, America Online, has estimated that 30% of its email is spam. America Online has stated that it was receiving 1.8 million spams per day from one company called Cyber Promotions. This continued until AOL obtained an injunction to stop this practice. Assuming that it takes the normal user 10 seconds to identify and discard a message, the end user was required to pay for 5,000 hours per day of connect time. What is the effect of this abuse of the Internet? One result is the system-wide drag on the entire information highway costing users the most valuable asset they have—their time. Another result is the millions of dollars citizens are collectively paying to their

Internet service providers for the increased usage time that is required to read and delete these unwanted e-mails.

Unfortunately, under the proposed legislation, there is no way for these businesses and individuals to recoup the money they have lost and continue to lose related to spam. My hope is that, with further consideration, the Subcommittee will provide such a remedy, as was done in the case of the TCPA.

It may be that, on first impression, one might surmise that the ISPs are the ones that are most damaged by junk e-mails. They suffer the increased expense in trying to filter out these unwanted e-mails, and are required to spend money to provide additional bandwidth to ensure optimal service to their end users. But, these ISPs already have a way to recoup these additional expenses: charge their end users. This is exactly what many of the ISPs have done. Netcom OnLine Communication Services, a mid-sized Internet service provider, has stated that: "A conservative estimate of the cost to our customers to support spam is approximately 10 percent of their monthly bill."

Pursuant to 8.630, the ISPs are not only permitted to recoup their additional expenses from the end user, but they will also be able to sue the entity which sent the unwanted e-mails. Yet, what incentive will the ISPs have to spend potentially hundreds of thousands of dollars in legal expenses to go after the spammer when they can just charge their end users for this additional cost of doing business? Who is left holding the bag and paying for the millions of dollars in damages which spamming causes? My business clients and the millions of other

citizens throughout the country who use the Internet. What recourse do they have for footing this bill?

None. The one question I have is: “Why”? If the concern is that every Internet user will race to the courthouse and file suit against spammers, such a concern is misplaced. As noted above, the TCPA resulted in a significant reduction in the number of junk e-mails sent, without a rush to the courts.

Moreover, that Act only provides for recovery of actual damages suffered unless egregious conduct is involved.

In May of last year, Senator Lieberman stated that: “Spain undermines the viability of the Internet by burdening service providers who are forced to pass on the costs of fighting spam to consumers. Our objective is not to strangle the Internet with government regulation or to ban spam outright. Rather, we simply set out to give individuals control of their own E-mail accounts and to address the cost-shifting problems wrought by the proliferation of spam.”

In this situation, as well, it is critical that consumers be allowed to recover their full actual damages – whether that is the costs to replace a computer or computer program that has been damaged as a result of excessive spamming, or lost earnings resulting from a clogged e-mail system. These are “concrete” and “provable” damages – and not speculative in the least. Since it is impossible for Congress to predict the full range of possible damages suffered by consumers and small businesses, these damages should not be limited. And just as in the TCPA, to deter this egregious behavior, this bill should also continue to include some type of financial penalty for violations of this anti-spam bill. Without such a penalty, the entities sending these unsolicited e-mails might determine it is financially worthwhile to continue to violate the law, so long as they do not reach a volume likely to damage most

computers or software.

Mr. Chairman and Senator Hollings, thank you again for allowing me to testify here today. I salute your consideration of this important issue and hope it will be possible to ensure that business and individual users of the Internet are not made to suffer economic harm without fair and balanced redress. I would be happy to answer any questions that you may have.